IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 638 OF 2004

Shabeer Ramjan Pathan .. Applicant

versus

State of Maharashtra .. Respondents

...

Mr.Shailesh Kantharia for the appellant.

Mr.D.P.Adsule, APP for the State.

CORAM : V.M. KANADE, J

DATED : 16th October 2004.

ORAL JUDGEMENT:-

1. Heard the learned counsel appearing on behalf of the applicant and the learned APP appearing on behalf of the State.

2. The appellant original accused is challenging the judgement and order passed by 3rd Adhoc Addl.

Sessions Judge, Kolhapur dated 10th May 2002 passed in Sessions Case no. 234 of 2001. By the said judgement and order, the accused was convicted for the offence punishable u/s. 376, 341, 451, 506 of the IPC and sentenced to suffer RI for 7 years and to pay fine of Rs.3,000/- and in default to suffer SI for a period of three months.

3. The prosecution case is that complainant resided at Village Bhendawade alongwith husband and daughter Sarita was aged 14 years and son Pravin was 9 years old on the date of the incident. The complainant and her husband who are agriculturist used to work in their own land and also used to do labour work in the land owned by others. On the date of the incident, i.e. on 30.9.2001, she left the house and had gone to do labour work in the field of her relatives. Her husband had also left the house at 8.00 a.m. and had gone to do labour work in another field. She returned at about 4.30 p.m. and she noticed the accused Shabbir Pathan leaving her house. When she went inside, she noticed that her daughter Sarita was weeping and when she asked as to what had happened, Sarita informed her that the accused had raped her. A complaint was lodged after lapse of

three days. The accused was thereafter arrested on 4th October 2001. Charge-sheet was filed and the trial Court convicted the accused and sentenced him to suffer RI for seven years. The appellant has challenged the said judgement and order. It is submitted on behalf of the learned counsel for the appellant that there was a delay of three days in filing the FIR. It was submitted that a false complaint was filed on account strained relations between the appellant who belongs to the Mohammedan community and the complainant belonged to Jain community. It was submitted that from the medical evidence, it could be seen that there was no injury on the private parts of the prosecutrix and that she was habituated to sexual intercourse. It was submitted that the medical certificate did not conclusively stated that the alleged offence had taken place on the date of the incident. It was submitted that PW no.6 had made lot of improvement and contradictions in her deposition. Therefore, the entire testimony of the prosecutrix ought to have been discarded by the trial Court. It was further submitted that the prosecution had not produced a medical certificate regarding the capability of the accused to indulge in sexual intercourse. In the absence of such a certificate,

the offence u/s.376 was not proved. The prosecution in order to prove its case has examined 11 witnesses. In order to prove the age of the prosecutrix, the prosecution has examined PW no.8 Shashikant Komake who is working in the Department of birth and death registers at Sangli Corporation. He produced the birth register of Sangli Nagar Parishad and the birth extract of the prosecutrix at Sr.No.3860 dated 5th August 1988 which was the birth entry of the prosecutrix was produced. He has stated that the entry was made in view of the opinion which was given by District Civil Hospital. In the cross-examination, it was suggested that the permanent residence of the parents of Sarita was shown as Kavathesar. However, merely because the permanent residence of the parents is shown as Kavathesar, it cannot be said that the birth certificate does not belong to the prosecutrix. In the said certificate, the name of the father is shown as Bhujgonda Patil and her mothers name is shown as Lahu. Therefore, in my view, the prosecution has proved that the birth date of the prosecutrix was 8th August 1988. Thus on the date of the incident, she was a minor and her age was 13 years. The prosecution has examined the prosecutrix as PW no.6. The prosecutrix has stated that the accused came inside

the house. He caught hold of her hand, threw her down on the ground, threatened her not to move. He closed the door of the kitchen and the other door which opens to the parade ground. He place paper ball of newspaper in her mouth, tore open her pants and remover her undergarments. He removed his pant and underwear and committed sexual intercourse for about 5 to 10 minutes. Thereafter, he put on his clothes, threatened her not to disclose the incident to her patents and went away. Thereafter, her mother came at 4.45 p.m. She narrated the incident to her. Thereafter, her father returned at 5.00 p.m. and after two to three days, the complaint was lodged in respect of the said grewening cross-examination. The defence could not shake the evidence of the prosecutrix. The evidence of the prosecutrix is corroborated by her mother PW no.7 who has stated that on the date of the incident, she returned home at about 4.15 p.m and she noticed the accused while he was leaving their house. When she went inside, the prosecutrix PW no.6 told her what had happened. Thereafter, her husband came home. She told the husband what had happened. Complaint was not lodged on the same day as she was afraid that if the complaint is lodged, the future of her daughter would

be ruined. However, after three days after discussing the matter in the family, the decided to lodge a complaint. This witness also has been cross examined at length particularly on the aspect of delay in recording the FIR. Though there were rival contradictions of this witness in her evidence, she has withstood the cross-examination and she has corroborated the evidence of the prosecutrix. Her evidence is further corroborated by PW no.9 Shivaji Nikam. The prosecution has also adduced the evidence of Dr.Mahendra who had examined the prosecutrix. He has also given his opinion about the age of the prosecutrix as 12 and 14 on the basis of X-Ray report. The evidence of the doctor, it does appear that there were no external injuries on her body or external or internal injuries on her private parts. However, merely because there are external injuries, it cannot be said that the said offence had not taken place. The case of the prosecutrix is that she was threatened by the accused and therefore, she did not offer any resistance. In such a case, it is possible that no injuries would be found on the private parts, particularly when the prosecutrix was examined after a lapse of 3 to 4 days from the date of incident. The trial court therefore, in my view has rightly held

that the accused has committed the said offence punishable u/s.376 of the IPC.

4. Conviction therefore is confirmed.

5. It is submitted by the learned counsel appearing on behalf of the accused that the accused is in jail from 30th September 2001. It is submitted that after the incident had taken place, the villagers had burnt down his hotel. It is submitted that as grave and irreparable loss has been caused to the property of the accused, it is submitted that the sentence may be reduced. In the present case, it has come on record that the hotel of the accused had been burnt down by the villagers. Further, no external injuries are found on the private parts of the prosecutrix and on her person. In view of this, the sentence is reduced from 7 years to 5 years. The appellant accused would be entitled to get the set off for the period during which he was in jail.

6. Appeal accordingly is partly allowed. Conviction is confirmed. Sentence however is reduced from 7 years to 5 years.

V.M. KANADE, J